IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, v. MARX WAYNE COONROD, Appellant.	No. 38490-6-II UNPUBLISHED OPINION

Van Deren, C.J. — Marx Wayne Coonrod appeals the trial court's (1) denial of his motion to withdraw his plea and (2) sentence. Coonrod argues that the trial court abridged his right to counsel when it required him to argue his motion to withdraw his plea pro se and to represent himself at sentencing without counsel. We vacate and remand for the trial court to (1) appoint new counsel, (2) reconsider Coonrod's motion to withdraw his plea, and (3) resentence him, if necessary.

FACTS

The State charged Coonrod with five counts of first degree robbery and three counts of attempted first degree robbery. Over the 600 days he awaited trial, Coonrod successfully moved to replace two of his three appointed attorneys by asserting complaints against them to the Washington State Bar Association (WSBA). The trial court then appointed his third attorney,

James Sowder. Eventually Coonrod's relationship with Sowder soured and Sowder filed a motion to withdraw. Then Coonrod apparently had a change of heart—many of his issues were resolved or at least acknowledged—and the trial court did not decide Sowder's first motion to withdraw.

Two months later, Coonrod "filed a letter with the Court wanting a new counsel" but the trial court did not grant Coonrod's request for a new attorney. Report of Proceedings (RP) at 394. With Sowder representing him at the next court date, Coonrod entered an *Alford* plea[1] for first degree robbery and two charges of first degree attempted robbery. But after his *Alford* plea and before sentencing, Coonrod moved to disqualify Sowder for a conflict of interest and again asked the court for new counsel. After Coonrod filed grievances against Sowder with the WSBA, Sowder moved to withdraw as attorney of record and Coonrod moved to withdraw and change his plea.

The sentencing hearing began with three motions not directly related to sentencing: (1) Sowder's motion to withdraw as counsel, (2) Coonrod's motion for new counsel, and (3) Coonrod's motion to withdraw his plea. Sowder stated:

> I found no basis of the Motion for Withdrawal and Change of Plea. I couldn't in good faith argue that, which is --
>
> THE COURT: And you're prepared to go forward on sentencing, Mr. Coonrod, by yourself?
>
> MR. COONROD: I suppose. If that's -- you know, I would rather be given a lawyer like I asked before with the Motion to Withdraw that I had.
>
> THE COURT: You've already had three.
>
> . . . .
>
> THE COURT: If I allow Mr. Sowder to withdraw, are you prepared to argue your motion?
>
> MR. COONROD: What do you mean, ar -- I mean, the motion is -- you

[1] *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *see also State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976).

> mean, my Motion [to substitute counsel]?
>
> THE COURT: No, the motion to withdraw your plea of guilt.
>
> MR. COONROD: I'm not sure. I haven't had a chance really to study it or anything. You guys are hitting me with stuff that, you know, I haven't had a chance to go to the law library and really study about. You know, I'm not pro se, I'm asking for another lawyer.
>
> THE COURT: I'm not going to give you another lawyer, Mr. Coonrod, you've had three. No one can satisfy you.
>
> . . . .
>
> MR. COONROD: I guess I have to withdraw my guilty plea.
>
> THE COURT: Well, all right, state your grounds.

RP at 440-43. The trial court did not address Sowder's motion to withdraw after denying Coonrod's request for a new attorney and before requiring Coonrod to argue his motion to withdraw his plea without aid of a lawyer. Coonrod continued to ask for counsel's help, "So yes, I would like to withdraw my plea of guilty and I would like a new counsel appointed for those grounds, Your Honor." RP at 449.

After the State's response to his argument Coonrod said:

> You know, Your Honor, [the Prosecutor is] a good lawyer. I'm trying to do this off the top of my head and, you know, I was -- I tried to get a new lawyer the week before when we were in court with [Sowder's earlier] Motion to Withdraw [from representation]. You would not allow me to have a new lawyer. You forced me to go to court with him, and I knew I had no chance when I went to court.
>
> He waited till the last minute to show me, you know, the plea bargain. I had to sign it either right then or I was hung for 30 years because he wasn't going to defend me. That is manifest enough that shows that he was not -- not doing his job.
>
> . . . .
>
> . . . And it's in the interviews and everything else. And I believe that I deserve to have a new lawyer and a chance to win my case.
>
> . . . .
>
> THE COURT: -- I'm denying the Motion to Withdraw.
>
> MR. COONROD: Your Honor, I beg of you --
>
> THE COURT: Mr. Coonrod --
>
> MR. COONROD: -- to give me a new lawyer.
>
> THE COURT: -- I'm denying your motion to withdraw the plea.

RP at 452-55.

The trial court then moved to sentencing. Coonrod, not Sowder, responded to the State's recommendation for a sentence at the high end of the sentencing range. The sentencing court turned to Sowder, who inquired whether he still represented Coonrod, but the court did not respond to that question:

> THE COURT: Okay. Mr. Sowder?
> MR. SOWDER: Well, I did move to withdraw at his request and mine. Am I still in the game or?
> THE COURT: You -- was the plea agreement 87 to 116 months?
> MR. SOWDER: It was free to recommend within that range.

RP at 457. The court then sentenced Coonrod and turned to the issue of restitution, which both Coonrod and Sowder addressed. Sowder then interjected, attempting to draw attention to the fact that his status as Coonrod's counsel remained unclear:

> MR. SOWDER: It's fairly quiet over here because I had that Motion to Withdraw. Am I still arguing sentencing issues or?
> THE COURT: Well, I want to make sure you're following the plea agreement, that's the sole status I want you to be re --
> MR. SOWDER: Okay.

RP at 459-60. Following further discussion of the sentence, Sowder again asked to withdraw and the trial court finally granted his request:

> MR. SOWDER: Now am I allowed to withdraw?
> I did file a Motion to Withdraw that articulated sort of a response to what he said and -- or a list of things that I have done.
> THE COURT: Present your order.
> MR. SOWDER: Okay.
> THE COURT: Okay.

RP at 462.

Coonrod appeals.

ANALYSIS

Sixth Amendment Right to Counsel

Coonrod argues that the trial court abridged his constitutional right to counsel when it forced him to argue his motion to withdraw his plea and sentencing issues pro se. We hold that Coonrod was deprived of his constitutional right to assistance of counsel when the trial court (1) refused to clarify Coonrod's legal representation by ignoring Sowder's motion to withdraw, (2) allowed Coonrod to equivocally waive his right to counsel, and (3) sentenced Coonrod without Sowder's participation as Coonrod's advocate.

A. Standard of Review

The Sixth Amendment of the United States Constitution protects a defendant's right "to have the assistance of counsel." "We review constitutional questions de novo." *State v. Castro*, 141 Wn. App. 485, 490, 170 P.3d 78 (2007).

B. Right to Counsel

A criminal defendant is guaranteed the right to counsel[2] "at all critical stages of a criminal proceeding, including sentencing." *State v. Robinso*n, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); CrR 3.1(b)(2). At a critical stage of a proceeding, a trial court does not have discretion to "relieve present counsel and require a non-waiving defendant to proceed without counsel." *State v. Bandura*, 85 Wn. App. 87, 97, 931 P.2d 174 (1997). Sentencing and presentencing plea withdrawal hearings are critical stages of the criminal proceeding and the defendant has the

[2] This right to counsel includes "the right to a reasonable opportunity to select and be represented by counsel of the defendant's choice." *State v. Price*, 126 Wn. App. 617, 631, 109 P.3d 27 (2005) (internal quotation marks omitted) (*quoting State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994). But the right to counsel does not guarantee the right to counsel of choice. *State v. Price*, 126 Wn. App. at 631.

constitutional right to be assisted by counsel at these stages. *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987); *State v. Harell*, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996).

We presume that a defendant was denied his constitutional right to counsel when counsel is "either totally absent, or prevented from assisting the accused during a critical stage of the [criminal] proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n. 25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). We will presume this error is prejudicial and will not conduct a harmless error analysis when the trial court denies the defendant a right to counsel and we assume prejudice because the error is structural in nature. *Harell*, 80 Wn. App. at 805; *see State v. Watt*, 160 Wn.2d 626, 632-33, 160 P.3d 640 (2007); *State v. Hughes*, 154 Wn.2d 118, 142-43, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *see also In re Det. of Kistenmacher*, 163 Wn.2d 166, 185-86, 178 P.3d 949 (2008) (Sanders, J., concurring and dissenting).

The State does not contend that the trial court (1) erred when it decided to hear arguments on Coonrod's motion to withdraw his plea or (2) abused its discretion when it heard arguments on Coonrod's motion to withdraw his plea; nor does the State contend that sentencing is not a critical stage. Therefore, Coonrod's right to counsel attached during the hearing on the motions and at sentencing.

C. Requests for New Counsel

The right to counsel of choice, unlike the right to counsel in general, is not absolute. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997). "A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between

the attorney and the defendant." *Stenson*, 132 Wn.2d at 734. Importantly, an attorney-client conflict may justify granting a substitution motion only when the defendant and counsel "are so at odds as to prevent presentation of an adequate defense." *Stenson*, 132 Wn.2d at 734.

"Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court." *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). Factors the trial court must consider in deciding a motion to withdraw and substitute appointed counsel include: "(1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings." *Stenson*, 132 Wn.2d at 734.

Here, the trial court addressed Coonrod's motion for new counsel, evaluated the reasons Coonrod wanted Sowder replaced, stated its own evaluation of Sowder's competence and representation, and apparently concluded that a late substitution of counsel would delay the scheduled sentencing hearing. Thus, in denying Coonrod's motion for new counsel, the trial court did not abuse its discretion.[3]

D. Critical Stage Proceedings Without Counsel or Waiver of Counsel

The right to counsel, the right to choice of counsel, and the right to self-representation are ordinarily dealt with in a discrete and separate fashion but, collectively, they require trial courts to follow certain steps. In critical stages of a criminal case where the right to counsel attaches, a defendant unsatisfied with counsel may ask for new counsel. *See, e.g.*, *DeWeese*, 117 Wn.2d at 376. In a situation where counsel is otherwise adequate, the trial court has the discretion to (1)

[3] Coonrod does not contend that the trial court abused its discretion when it refused to appoint new counsel.

appoint new counsel, (2) deny appointment of new counsel and require counsel to proceed with representation, or (3) offer the defendant the option of proceeding with self-representation or remaining with his current counsel. *DeWeese*, 117 Wn.2d at 376, 379; *see Bandura*, 85 Wn. App. at 97-98.

Where the defendant's choice is between continuing with existing counsel or proceeding pro se, there is a "tension between a defendant's autonomous right to choose to proceed without counsel and a defendant's right to adequate representation." *DeWeese*, 117 Wn.2d at 376. Our Supreme Court recently characterized this interplay and "dissonant" relationship between these rights, "Specifically, the right of self-representation is the other side of the coin of the right to counsel." *State v. Rafay*, No. 80865-1, __ Wn.2d __, __ P.3d __, 2009 WL 4681215, at ¶14 (Dec. 10, 2009). "If the defendant chooses not to continue with appointed counsel, requiring such a defendant to proceed pro se does not violate the defendant's constitutional right to be represented by counsel, and may represent a valid waiver of that right."[4] *DeWeese*, 117 Wn.2d at 376.

A defendant who wishes to waive the right to counsel and exercise the right to self representation—even at a trial court's prompting—must make "an unequivocal request to represent himself" or waive by conduct his right to counsel. *State v. Woods*, 143 Wn.2d 561, 587-88, 23 P.3d 1046 (2001); *City of Tacoma v. Bishop*, 82 Wn. App. 850, 856-61, 920 P.2d 214 (1996). But where the defendant's waiver is equivocal or his conduct does not establish waiver,

[4]For example, where a defendant repeatedly tells the trial court that he prefers to "represent himself rather than be represented by appointed counsel, and he personally submit[s] a written motion to that effect[,] his request must be deemed unequivocal." *State v. Sinclair*, 46 Wn. App. 433, 438, 730 P.2d 742 (1986).

the defendant retains his right to counsel and the trial court cannot require[5] the defendant to represent himself. *DeWeese*, 117 Wn.2d at 377; *Bandura*, 85 Wn. App. at 97; *see Rafay*, 2009 WL 4681215, at ¶14.

"Statements of desire not to be represented by a court appointed attorney do not express an intent to represent oneself without counsel" and these statements do not "constitute the necessary unequivocal request for self-representation." *State v. Garcia*, 92 Wn.2d 647, 655, 600 P.2d 1010 (1979). As our Supreme Court has noted:

> While [the defendant] did state that he was "prepared to go for myself," he also stated, "I'm not even prepared about that," and "[t]his is out of my league for doing that." Taken in the context of the record as a whole, these statements can be seen only as an expression of frustration . . . with the delay in going to trial and not as an unequivocal assertion of his right to self-representation.

State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995). Similarly, in *Bandura*, we reversed a trial court's decision to require a nonwaiving defendant to proceed pro se where the trial court had denied the defendant's request for a sixth attorney, despite an "untimely and very possibly unwarranted" request for new counsel at sentencing. *Bandura*, 85 Wn. App. at 97-98.

Even when the defendant unequivocally or by conduct waives his right, he must understand the risks of self-representation and the trial court must satisfy itself that the defendant's waiver of his right to counsel is knowing, intelligent, and voluntary. *Rafay*, 2009 WL 4681215, at ¶14; *State v. Smith*, 50 Wn. App. 524, 529, 749 P.2d 202 (1988). The validity of the defendant's waiver must be either (1) clear from the record or (2) supported by a colloquy between the defendant and the trial court. *State v. Buelna*, 83 Wn. App. 658, 660-61, 922 P.2d

[5] The trial court only has discretion to require an unwilling defendant to proceed pro se if he forfeits his right to counsel. *See Bishop*, 82 Wn. App. at 858-60.

1371 (1996); *Smith*, 50 Wn. App. at 529.

A colloquy also affords trial courts an opportunity to "carefully balance the dissonant rights to counsel and to self-representation when a defendant seeks to proceed pro se." *Rafay*, 2009 WL 4681215, at ¶14. "In absence of a colloquy, the record must otherwise show that the accused was aware of the risks of self-representation" and knowingly, voluntarily, and intelligently waived his right to counsel. *Rafay*, 2009 WL 4681215, at ¶14; *Smith*, 50 Wn. App. at 529; *see City of Bellevue v. Acrey*, 103 Wn.2d 203, 211-12, 691 P.2d 957 (1984); *Bandura*, 85 Wn. App. at 97. Where the record is silent, we do not presume waiver. *State v. Gann*, 36 Wn. App. 516, 521, 675 P.2d 1261 (1984).

Here, Coonrod did not unequivocally waive his right to counsel before being required to proceed pro se, "I would rather be given a lawyer like I asked before"; "You know, I'm not pro se, I'm asking for another lawyer"; and "Your Honor, I beg of you . . . to give me a new lawyer." RP at 440, 442, 455. At sentencing,[6] Sowder was present and interacted with the trial court but made no arguments and the trial court apparently maintained his presence solely to answer questions about the plea agreement. Only after signing the judgment and sentence, did the trial court allow Sowder to officially withdraw.[7]

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[6] The trial court also required Coonrod to represent himself at sentencing, "And you're prepared to go forward on sentencing, Mr. Coonrod, by yourself?" RP at 440. Sowder did not represent Coonrod at sentencing in the manner he originally planned; when scheduling the sentencing hearing the State noted, "Mr. Sowder's putting together some mitigating evidence that he'd like to offer" at sentencing and Sowder also mentioned the possibility of submitting "a number of transcripts from a variety of witnesses." RP at 435-36. At sentencing, Sowder did not submit or argue any mitigating evidence in the form of transcripts or witness statements.

[7] We note that a trial court should resolve motions to substitute counsel, to withdraw from representation, and to waive counsel before deciding other matters before it. *See e.g.*, *State v. Pugh*, No. 38149-4-II, __ Wn. App. __, __ P.3d __, 2009 WL 4815669, at ¶¶ 6-11 (Dec. 15, 2009)

By requiring Coonrod to represent himself, while maintaining Sowder's presence without deciding his status, the trial court denied Coonrod's right to counsel and forced an equivocating Coonrod to represent himself. Thus, the trial court abused its discretion and we vacate Coonrod's sentence and remand for the trial court to (1) appoint new counsel for Coonrod, (2) reconsider Coonrod's motion to withdraw his plea, and (3) resentence Coonrod if it does not hear or denies the motion to withdraw his plea.[8]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren. C.J.

We concur:

Houghton, J.

Penoyar, J.

[8] In his statement of additional grounds for review, Coonrod argues that he did not receive effective assistance of counsel based on his claims that counsel did not adequately prepare his case, which forced him into a position where he plead guilty to avoid a worse outcome. Because we grant relief based on Coonrod's right to counsel arguments and remand for further proceeding related to whether Coonrod is entitled to withdraw his plea based on the arguments he raises here, we do not reach his ineffective assistance of counsel claims.